90-171

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

April Term, 1990

James Peter Nalbandian, *Petitioner*

v.

Superior Court of the State of Arizona,
in and for the County of Maricopa, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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QUESTIONS PRESENTED

1. Does the Constitutional prohibition against Double Jeopardy in a criminal trial prevent a judge from declaring a mistrial when the jury explains to the court that the unanimous opinion of the jury is that the State has not proven its case, but two jurors have "gut feelings" that they do not want to set the Defendant free?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, James Peter Nalbandian and the Respondents, the Superior Court of the State of Arizona, in and for the County of Maricopa and the Honorable Barry G. Silverman, Judge of Division 37 thereof. Robert K. Corbin, Attorney General of the State of Arizona was a real party in interest.

The Respondents before this Court include the Superior Court of the State of Arizona, in and for the County of Maricopa, the Honorable Barry G. Silverman, Judge of Division 37 thereof, and Robert K. Corbin, Attorney General of the State of Arizona, real party in interest.

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IN THE SUPREME COURT OF THE UNITED STATES

April Term, 1990

James Peter Nalbandian, Petitioner

v.

Superior Court of the State of Arizona,
in and for the County of Maricopa, et al.,
Respondents.

Petition for a Writ of Certiorari
to the Supreme Court of Arizona

The Petitioner, James Peter Nalbandian, respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of Arizona entered in the above-entitled proceeding on February 27, 1990.

OPINIONS BELOW

The order of the Supreme Court of Arizona denying review on February 27, 1990, has not been reported. It is reprinted in the Appendix hereto, p. 1a, *infra*.

The opinion of the Court of Appeals for the State of Arizona, Division One, is reported at 37 Ariz. Adv. Rep. 21, ___ P.2d ___, ___ Ariz. ___ (Ariz. App. 1989), and is reprinted in the appendix hereto, p. 2a, *infra*.

JURISDICTIONAL STATEMENT

Petitioner filed an appeal with the Arizona Court of Appeals following the trial court's declaration of a mistrial on his criminal case. The Arizona Court of Appeals denied the requested relief on June 27, 1989.

Petitioner then sought review before the Arizona Supreme Court which denied the Petition for Review on February 27, 1990.

The jurisdiction of this Court to review the decree of the Arizona Supreme Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner was a defendant in a criminal case in the Superior Court of the State of Arizona, Maricopa County; the Petitioner was accused of aggravated assault. The trial took eleven days and covered over two weeks. The events surrounding the jury deliberations form the basis of this petition.

The jury first began deliberations at 9:00 a.m. on May 6, 1988. At 9:20 a.m. the Court received a note from the jury

which was read to the prosecution and defense counsel. It stated:

> The jury requests a copy of the transcript of the trial. Plus a calender from 1986. [signed] T. Sandford 5/6/88, 9:20

After discussion with counsel for both parties, the trial court submitted the following response to the jury in addition to supplying them with a 1986 calendar.

> The entire trial was not transcribed, only portions were. Therefore, please rely on your memories.

After six hours of deliberation a second note came from the jury. It stated:

> The jury cannot make a decision with the facts provided.

The trial court then ordered the jury back into the court room. The trial court asked the foreperson if there was a reasonable probability that the jury could reach a verdict with additional time. The foreperson responded affirmatively. By a show of hands, three other jurors disagreed

with the foreperson. The trial court gave the jury the following verbal response:

> Ladies and gentlemen, it's 3:40 [p.m.] now. I would ask you give it another hour or so. I don't want you to feel pressured to reach a verdict one way or the other. If you can't reach a verdict, so be it. We will give it another hour and see where we are then. We will stand in recess until about 4:40. Thank you.

Approximately five minutes later two notes were received from the jury. One note stated:

> All eight of us feel that the State did not prove that Jim did the abuse. But two people think he <u>probably</u> did do it (a gut feeling). They do not want him to go free. [signed] Mrs. Kobert. (Emphasis added.)

The other note said

> If there is any additional evidence, may we see it?

Upon receipt of the two notes, counsel for the Petitioner moved that the court direct a verdict of not guilty or in the alternative that the court take some action to determine whether the note constituted the opinion of each of the

jurors. The court did not take any action on the note which indicated that the State failed to prove its case. The court took no action to assist the jury. Instead, at approximately 4:30 p.m. the court sent the jury the following written response:

> There is no additional evidence for you to see. Please continue to deliberate until 4:30. Please keep in mind all the previous instructions. If you reach a verdict before 4:30, let me know.

At 4:40 p.m. the court reconvened the jury and asked the foreperson if there was a reasonable probability that the jury would reach a verdict. The foreperson responded that he did not believe that the jury would be able to decide a verdict. When no other juror disagreed with the foreperson, the court immediately declared a mistrial, set the case for a second trial and dismissed the jury. The Petitioner objected to the court's declaration of a mistrial.

At no time did the court re-instruct the jury as to the State's burden of proof, nor did the court act upon Petitioner's motion. The court considered no alternatives before declaring a mistrial. The court did not inquire as to the note which stated the unanimous opinion of the jury was that the State did not prove its case.

Immediately after the court declared a mistrial it dismissed the jury. Counsel for the Petitioner objected (on several grounds) to ordering a mistrial and to the court's failure to give further instruction. Petitioner appealed the declaration of mistrial to the Arizona Court of Appeals. There the Petitioner specifically raised federal questions regarding double jeopardy arguing that there was no manifest necessity in the court's declaration of a mistrial, therefore a retrial was barred by the Double Jeopardy clause of the United States Constitution.

The Arizona Court of Appeals denied Petitioner's requested relief. Petitioner sought review by the Arizona Supreme Court which denied the request.

REASONS FOR GRANTING THE WRIT

I THE DECISION WHICH ALLOWS A TRIAL COURT TO DECLARE A MISTRIAL IN A CRIMINAL CASE WHEN THE JURY CLEARLY AND UNANIMOUSLY INDICATES THAT THE STATE FAILED TO PROVE ITS CASE, RAISES IMPORTANT AND UNRESOLVED ISSUES OF DOUBLE JEOPARDY.

A. Introduction.

The text of the Double Jeopardy Clause of the Constitution's Fifth Amendment states: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969).

The Double Jeopardy Clause protects a criminal defendant from repeated prosecutions for the same offense by recognizing the defendant's valued right to have his trial completed by a particular tribunal. *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 2087 (1982).

When a criminal matter ends in a mistrial and the defendant is subjected to reprosecution, issues arise under the Double Jeopardy Clause as to whether or not a second trial is barred. *See, Oregon v. Kennedy*, 456 U.S. at 672, 102 S.Ct. at 2087. Application of Double Jeopardy differs when the trial is terminated over the objection of the defendant.

When a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is generally not offended by a second prosecution. "A motion by the defendant for mistrial is ordinarily assumed to remove any barrier to

reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error." *United States v. Scott*, 437 U.S. 82, 93, 98 S.Ct. 2187, 2195 (1978), quoting, *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 557 (1971). This rule is subject to the following exception: where a defendant in a criminal trial successfully moves for a mistrial, a second effort to try him is barred by Double Jeopardy only if the conduct giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct <u>intended</u> to provoke the defendant into moving for a mistrial. *Oregon v. Kennedy*, *supra*, 456 U.S. at 679, 102 S.Ct. at 2091.

Where, on the other hand, the trial court declares a mistrial on its own motion, this Court has balanced the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment of him, against the public interest in insuring that justice

is meted out to offenders. *United States v. Scott*, *supra*, 437 U.S. at 92, 98 S.Ct. at 2194.

Where the trial is terminated over the objection of the defendant, the Fifth Amendment's bar to a second trial does not apply upon a determination of "manifest necessity" for declaring a mistrial. *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 830 (1978).

The manifest necessity requirement stems from Justice Story's classic formulation of the test, which "has been quoted over and over again to provide guidance in the decision of a wide variety of cases." *Id.* 434 U.S. at 506, 98 S.Ct. at 830.

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

United States v. Perez, 9 Wheat 579, 580, 6 L.Ed. 165 (1824).

The determination by the trial court to declare a mistrial is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first empaneled is heavy. *Illinois v. Somerville*, 410 U.S. 458, 471, 93 S.Ct. 1066, 1073 (1973). The trial court's discretion to discharge a jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances because the "prohibition of Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'" *Downum v. United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 1034 (1963), quoting *United States v. Boll*, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194. The court's discretion in ordering a mistrial "must be exercised with careful regard for the interests first described in *United States v. Perez*," which

required a showing of manifest necessity. *United States v. Scott*, 437 U.S. at 93, 98 S.Ct. at 2195.

B. Several Important and Unresolved Issues of Double Jeopardy are Raised by Petitioner.

This Court has indicated concern for, but has not ruled on, Double Jeopardy issues which arise when it is clear that a jury is about to acquit but the trial is ended abruptly by either the judge or prosecutor. For example, this Court in *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221 (1957) announced the following rule: "This [the prohibition of Double Jeopardy] prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial **when it appears that the jury might not convict.**" *Id.*, 355 U.S. at 188, 78 S.Ct. at 224 (emphasis added).

This Court has also expressed concern for mistrials resulting from a fear

that the jury was likely to acquit the accused. "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different [Double Jeopardy] considerations would, of course, obtain." *United States v. Tateo*, 377 U.S. 463, 467, 84 S.Ct. 1587, 1590, n. 3 (1964). The Court explained that statement in *Oregon v. Kennedy, supra*. There it was stated that prosecutorial misconduct, initiated by fear of an acquittal, which causes a defendant to successfully move for mistrial, is an exception to the general rule that a defendant's motion for mistrial is not a bar to a second trial. *Oregon v. Kennedy*, 456 U.S. at 677, n. 8, 102 S.Ct. at 2090 n. 8.

The Petitioner's case raises the unresolved issue of subjecting a defendant to a second trial when it appears that the first jury is going to acquit. In the case at bar, a note from the jury indicated that

it was their unanimous opinion the State failed to prove its case against the Petitioner, and that two jurors had gut feelings about the Petitioner because they did not want to see him set free. Upon receipt of the note the trial court failed to assist the jury with its obvious confusion as to the burden of proof. Instead, the judge inquired if the jury was deadlocked and upon an affirmative response from the foreman, the court immediately declared a mistrial on its own motion. The court's mistrial came with no warning, nor did the court previously express to either party that it was going to declare a mistrial.

Although it was not done expressly, this Court seems to have moved away from the "manifest necessity" requirement for when the court declares a mistrial. *See, Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081 (1984). *Richardson* involved a case where the trial

court declared a mistrial. *Id.*, 468 U.S. at 318, 104 S.Ct. at 3082. Although this Court referred to the "manifest necessity" requirement, it apparently did not expressly affirm that it was required for the trial court to declare a mistrial, as was stressed in *Arizona v. Washington, supra*. *See, Richardson, supra*, 468 U.S. at 323-324, 104 S.Ct. at 3085. Instead, this court expressed its opinion in the following language: "[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson, supra*, 468 U.S. at 325, 104 S.Ct. at 3086.

After *Richardson*, it is not clear as to the state of the law regarding the "manifest necessity" requirement for a court to declare a mistrial over the objection of the defendant. The language used in *Richardson* was based on the notion of "continuing jeopardy" expressed in *Justices*

of Boston Municipal Court v. Lydon, 466 U.S. 294, 104 S.Ct. 1805 (1984) and *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757 (1970). The notion of continuing jeopardy has traditionally been applied to situations where a defendant's conviction is overturned on appeal. *United States v. Boll*, 163 U.S. 662, 16 S.Ct. 1192 (1986). *See also, United States v. Tateo, supra; Price v. Georgia, supra; Justices of Boston Municipal Court v. Lydon, supra.*

Petitioner respectfully asserts that this Court's opinion in *Richardson* casts serious doubt and confusion as to the "manifest necessity" required for a trial court to declare a mistrial over the defendant's objection. This confusion was expressed by Justice Brennan in *Richardson*, who, along with Justice Marshall, concurred in part and dissented in part. There Justice Brennan stated:

> Apparently, under the Courts Approach only an actual judgment of acquittal, or an unreserved

> conviction, would "terminate" jeopardy and thereby bar retrial. Accordingly, a defendant who is constitutionally *entitled to an acquittal* but who fails to receive one - because he happens to be tried before an irrational or lawless factfinder or because his jury cannot agree on a verdict - is worse off than a defendant tried before a factfinder who demands constitutionally sufficient evidence.

Richardson v. United States, 468 U.S. at 327, 104 S.Ct. at 3087, Justice Brennan, concurring in part and dissenting in part, (emphasis supplied by Court).

Justice Brennan clarified the point in *Richardson* when he stated: "In so concluding, I do not reject the longstanding rule, emphasized by the Court, that, in cases of 'manifest necessity' retrial may be permitted despite a mistrial." *Id.*, 468 U.S. at 329, 104 S.Ct. at 3088.

This Court should grant a writ of certiorari to review these unresolved issues of Double Jeopardy and to reaffirm the longstanding principle that if a trial court is to declare a mistrial over the objection

of the defendant, a showing of "manifest necessity" is required. *Arizona v. Washington, supra*, 434 U.S. at 505, 98 S.Ct. at 830. To allow a trial judge to discharge a jury whenever it appears that the State's evidence is insufficient to convict is an "abhorrent practice" and should be condemned. *Arizona v. Washington, supra*, 434 U.S. at 507-508, 98 S.Ct. at 831.

C. <u>There was no "Manifest Necessity" to Discharge the Jury in Petitioner's Trial</u>.

In explaining the manifest necessity requirement, this Court has stated that ". . . the courts have held that the trial judge may discharge a **genuinely** deadlocked jury and require the defendant to submit to a second trial." *Arizona v. Washington, supra*, 434 U.S. at 509, 98 S.Ct. at 832 (emphasis added). Such a decision by the trial judge is accorded great deference by a reviewing court. *Arizona v.*

Washington, supra, 434 U.S. at 510, 98 S.Ct. at 832.

> It should be noted, however, that the rationale for this deference in the "hung" jury situation is that the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate. **If the record reveals that the trial judge has failed to exercise the "sound discretion" entrusted to him, the reason for such deference by an appellate court disappears. Thus if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate.**

Arizona v. Washington, supra, 434 U.S. at 510-511, n. 28, 98 S.Ct. at 832-833, n. 28. (emphasis added).

This Court requires a "high degree" of necessity before a trial judge can conclude that a mistrial is appropriate. *Arizona v. Washington*, 434 U.S. at 506, 98 S.Ct. at 831. "Moreover it is not even essential that a verdict of guilt or

innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge." *Green v. United States, supra*, 355 U.S. at 188, 78 S.Ct. at 224.

At the Petitioner's criminal trial several jury notes indicated to the court that the jury was confused. The last note stated it was the unanimous opinion of the jurors that the State had not proven its case but a couple of the jurors had gut feelings and they did not want the Petitioner to be set free.

The trial court took no action regarding this note. The court allowed the jury to continue deliberation for about 40 minutes after the note was received. After this short deliberation the judge asked the foreman if further deliberations would be helpful, to which the foreperson responded negatively. Thereafter, the court immediately declared a mistrial with no warning whatsoever. This was not a hung

jury, this was a confused jury. Regardless of whether or not this was a hung jury, the trial judge declared a mistrial in the absence of a high degree of manifest necessity and it appears that the court acted out of fear that the jury would acquit the Petitioner. Discretion to the trial court should not be considered because the judge failed to exercise sound discretion. *Arizona v. Washington, supra*, 434 U.S. at 511, n. 28, 98 S.Ct. at 833, n. 28.

Notes from the jury which indicate an inability to agree or confusion as to the law are "tantamount to a request for further instructions." *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 2094-2095 (1975). When such a note is received from a jury, at the very least the court should inform the jury as to the correct and applicable law. *Id.*, 422 U.S. at 40, 95 S.Ct. at 2095. "When a jury makes explicit its difficulties [through notes] a trial judge should clear them away with concrete

accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-613, 66 S.Ct. 402, 405 (1946); *see also, United States v. Martinez-Nava*, 838 F.2d 411, 414 (10th Cir. 1988).

At Petitioner's trial, the court received notes from the jury indicating that the jury had difficulty understanding the state's burden of proof. The court did not clear away the confusion with concrete accuracy. The court did nothing.

The case at bar is similar to *Cobb v. State*, 272 S.E.2d 296, 246 Ga. 619 (1980). In *Cobb* the Georgia Supreme Court held that there was no showing of "manifest necessity" allowing the trial judge to declare a mistrial when a jury indicates that there is insufficient evidence to convict or acquit and jury deliberations are cut short. *Id.*, 272 S.E.2d at 297. Similar to *Cobb*, Petitioner's mistrial was also declared without the element of "manifest necessity." At Petitioner's trial the jury indicated confusion, but it appears that

they had already reached a verdict in favor of the Petitioner. The jury needed guidance from the court and none was received. Instead, the judge jumped at the chance to declare a mistrial. As soon as the jury foreman indicated that the jury was unable to reach a verdict, the trial judge immediately declared a mistrial. The court did not confer with counsel nor had the court indicated its intention to declare a mistrial.

The trial court may discharge a "genuinely" deadlocked jury. *Richardson v. United States, supra*, 468 U.S. at 324, 104 S.Ct. at 3085, quoting *Arizona v. Washington*, 434 U.S. at 509, 98 S.Ct. at 832. Petitioner asserts that his jury was not deadlocked at all and the trial court's hasty decision thereof was not an exercise of sound discretion; as a result, close appellate scrutiny is appropriate. *Arizona v. Washington*, 434 U.S. at 511, 98 S.Ct. at 833, n. 28.

The trial court must consider alternatives before declaring a mistrial as a prerequisite to the manifest necessity element. *Abdi v. State of Georgia*, 744 F.2d 1500, 1503 (11th Cir. 1984). "Well aware of the important constitutional interests at stake, several circuits have required that the trial courts permit the accused an opportunity to oppose a mistrial order and consider all possible alternatives before declaring a mistrial." *Jones v. Hogg*, 732 F.2d 53, 56 (6th Cir. 1984) citing *Harris v. Young*, 607 F.2d 1081, 1085 (4th Cir. 1979); *United States v. MacQueen*, 596 F.2d 76, 82-83 (2d Cir. 1979); *United States v. Pierce*, 593 F.2d 415, 417 (1st Cir. 1979); *United States v. Sanders*, 591 F.2d 1293, 1299 (9th Cir. 1979); *United States v. McKoy*, 591 F.2d 218, 222 (3d Cir. 1979); *United States v. Starling*, 571 F.2d 934, 941 (5th Cir. 1978).

A trial court commits error when deciding to declare a mistrial when the decision is made inappropriately fast. *Abdi*

v. State of Georgia, supra, 744 F.2d at 1504. Petitioner asserts that the facts surrounding his mistrial do not indicate a high degree of manifest necessity. The jury indicated that they had reached a not guilty verdict. The trial court failed in its judicial duty to clear away any jury confusion with concrete accuracy. This jury was not genuinely deadlocked and the court declared a mistrial without giving the Petitioner an opportunity to dispute the mistrial order. No alternatives were considered by the court.

The prohibition of double jeopardy embraces the defendant's valued right to have his trial completed by a particular tribunal; a second trial may be grossly unfair because it increases the financial and emotional burden on the accused, it prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and it may even enhance the risk that an innocent defendant will be

convicted. *Arizona v. Washington, supra,* 434 U.S. at 503-504, 98 S.Ct. at 829.

The policy of Double Jeopardy clause is applicable to the Petitioner's case. Trial judges should be thwarted from declaring a mistrial when it appears the jury is acquitting the accused. In such a case the showing of manifest necessity should be crystal clear. A judge should instruct the jury in a manner to alleviate any obvious and expressed confusion. A judge should consider the rights of the criminal defendant and should not jump at the first chance to declare a hung jury. Such an "abhorrent practice" should be condemned.

CONCLUSION

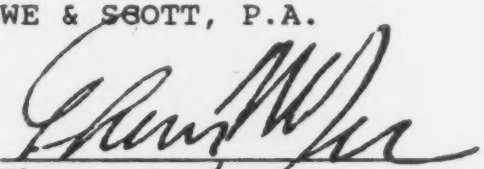
For the foregoing reasons, the Petitioner should be granted a writ of certiorari. Petitioner respectfully requests that this Court reaffirm the longstanding principle of manifest necessity as a requirement for a trial court to

declare a mistrial over the objection of a criminal defendant. Furthermore, Petitioner requests that this Court determine, as a matter of law, that there was no manifest necessity for the trial court to declare a mistrial in light of the jury's indications that it had acquitted the Petitioner.

DATE: MAY 21, 1990

RESPECTFULLY SUBMITTED

CROWE & SCOTT, P.A.

By: 

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APPENDIX

February 27, 1990

Re: **JAMES PETER NALBANDIAN vs. SUP CT MARICOPA CTY-HON BARRY G. SILVERMAN/ROBERT K. CORBIN**
Supreme Court No. CV-89-0400-PR
Court of Appeals No. 1 CA-SA 88-160; 1 CA-CR 88-760 (Consolidated)
Maricopa County No. CR-162723

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 26, 1990, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 27th day of February, 1990.

NOEL K. DESSAINT, Clerk

TO: Michael B. Scott, Esq., Crowe & Scott, P.A., 1100 E. Washington, Suite 200, Phoenix, Arizona 85034
Hon. Robert K. Corbin, Attorney General, 1275 West Washington, Phoenix, Arizona 85007 ATTN: Jessica Gifford Funkhouser, Esq., David A. Powell, Esq., Vicki Gotkin Adler, Esq. and Diane M. Ramsey, Esq.
Richard M. Romley, Maricopa County Attorney, Arizona Title Building, 111 West Monroe, Suite 1800, Phoenix, Arizona 85002
Glen D. Clark, Clerk, Court of Appeals, Division One, First Floor, West Wing, State Capitol, Phoenix, Arizona 85007

av

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAMES PETER NALBANDIAN, Petitioner-Appellant, v. SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE BARRY G. SILVERMAN, a judge thereof, Respondent Judge, ROBERT K. CORBIN, Attorney General of the State of Arizona, Real Party in Interest.	)	1 CA-SA 88-160 1 CA-CR 88-760 (Consolidated) DEPARTMENT B O P I N I O N
STATE OF ARIZONA, Appellee, vs. JAMES PETER NALBANDIAN, Appellant.	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR-162723

The Honorable Barry G. Silverman, Judge

SPECIAL ACTION JURISDICTION ACCEPTED;
RELIEF DENIED; APPEAL DISMISSED

Robert K. Corbin, The Attorney General
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J A C O B S O N, Presiding Judge

This case involves whether a defendant is entitled to an interlocutory appeal when a plea of double jeopardy is raised. James Peter Nalbandian (defendant) appealed from the trial court's denial of his motion for a directed verdict of not guilty "pursuant to Abney v. United States, 431 U.S. 651 (1976)." The trial court refused to recognize his notice of appeal and proceeded to set a firm trial date. Defendant filed a special action petition challenging only the trial court's refusal

to enter a stay of the proceedings, contending that a right to appeal on double jeopardy grounds existed even though the trial court's denial did not constitute final judgement. We granted defendant's request for a stay and, on our own motion, consolidated the special action and appeal ordering the parties to respond to the following issues:

> (1) Whether this court should recognize the United States Supreme Court concept that a defendant is entitled to interlocutory review of a decision of the trial court ordering a new trial when the defendant makes legitimate claims that his constitutional rights against double jeopardy may be infringed by a second trial;
>
> (2) Whether the right to review is constitutionally or statutorily based;
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> (3) Whether such review should be undertaken by special action or appeal;
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> (4) Whether in this case, the trial court improperly denied defendant's motion for a verdict of not guilty and thus erred in declaring a mistrial.

I. BACKGROUND.

Defendant's case went to the jury after a three week trial. During deliberation, the jurors made a number of inquiries to the court. After requesting a copy of the transcript, which was refused, and after an additional six hours of deliberation, the jurors communicated to the court that the panel could not reach a decision "with the facts provided." Defendant moved for a mistrial stating "I think they have had adequate time to deliberate and reach a verdict. . . . " The court asked the foreman if he believed the jury could reach a verdict with additional time. The foreman replied that he believed they could, but three jurors disagreed. The trial court then instructed the jurors that they should continue deliberating for about an hour. Defendant moved for mistrial once again. The jurors then sent two notes to the court. The first, signed by one juror, stated:

> All eight of us feel that the state did not prove that Jim did the abuse. But two people think he probably did do it (A gut feeling). They do not want him to go free. [Signature of juror]

The second note stated:

> If there is any additional evidence, may we see it?

The court responded that no additional evidence existed and that the jury should continue to deliberate. Defendant then withdrew his motion for a mistrial and requested that the court enter a verdict of not guilty in response to the signed note.

After the jury deliberated about an hour, the court reconvened. The foreman related that the jurors were unable to reach a decision. Defendant again requested a directed verdict, or alternatively, that the court read the signed note to the jury and poll the jurors to determine whether they established a unanimous verdict of not guilty. The court denied his requests and asked the jury to continue to deliberate for

another half an hour. Defendant objected. After a half hour had elapsed, the court asked the foreman if the jury had reached a verdict. The foreman responded that it had not. None of the jurors disagreed. The court then declared a mistrial "because the jury [was] hung," set the case for retrial, and dismissed the jury. Subsequently, defendant filed a motion for entry of a verdict of not guilty. The court denied the motion. This special action and appeal ensued.

II. DISCUSSION.

When defendant filed his notice of appeal, he claimed it divested the trial court of jurisdiction. See Rule 31.11, Arizona Rules of Criminal Procedure; State v. Ferguson, 119 Ariz. 55, 579 P.2d 559 (1978). The trial court requested further briefing on a defendant's right to an interlocutory appeal when the basis of the appeal implicates double jeopardy grounds. The trial court concluded that defendant had

no right to appeal in the absence of a final judgment and refused to stay the new trial.

Defendant sought relief by special action from only the trial court's refusal to stay the proceedings. He failed to bring the issue of the right to an interlocutory appeal squarely before this court at that time. We therefore consolidated the special action with the appeal to address the double jeopardy issue, and, if we determined that review was appropriate, to address the defendant's contention that a second trial would impermissibly put him in jeopardy once again.

A. The Holding in Abney v. United States.

Ordinarily interlocutory appeals are not permitted in criminal cases. "[T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." Abney v. United States, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d

651 (1977), quoting DeBella v. United States, 369 U.S. 121, 126, 82 S. Ct. 654, 658, 7 L. Ed. 2d 614 (1962). Despite the unsettling and potentially damaging effect of such appeals, in Abney, the Supreme Court held a defendant had the right to appeal because:

> [e]ven if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the double jeopardy clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.[1/]

[1/] In reaching this result, the Abney court relied upon Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), which held that certain rights were separable from and collateral to an action were often too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case was adjudicated. The Cohen court enunciated a three part test to determine when the collateral order doctrine could be applied:

B. Is the Abney Right to Appeal Statutorily or Constitutionally Based?

Defendant claims Abney controls in this case because the Supreme Court has held that the fifth amendment protection against double jeopardy applies to the states. See Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). He also cites State v. Choate, 151 Ariz. 57, 725 P.2d 764 (App. 1986), in which the court found it had jurisdiction to review an interlocutory order implicating double jeopardy on appeal, pursuant to Abney.

On the other hand, the state contends Abney merely construed a federal statutory right to appeal and therefore does

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1. Although no final judgement a fully consummated decision of the court had to exist;

2. The issue had to be collateral to and separable from the principal issue and not simply a step toward final disposition of merits of the case that would be merged in the final judgment; and

3. Rights involved in decision would be irreparable lost if appellate review was postponed until final judgment.

not control when this court is construing a defendant's right under Arizona law. It argues defendant's reliance on both Abney and Choate is misplaced and claims that in Arizona a defendant may seek appellate review only under the criteria set forth in A.R.S. 13-4033.[2/] Thus, the state argues, a defendant is precluded from appealing from an interlocutory order. The state asserts that Abney also found a defendant's right to appeal must be established solely within the terms of the applicable statute because no

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[2/]That statute provides that an appeal may be taken by a defendant only from the following orders:

> 1. A final judgment of conviction.
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> 2. An order denying a motion for a new trial ord denying a motion for an arrest of judgment, or from an order made after judgment affecting the substantial rights of the party.
>
> 3. A sentence on the grounds that it is illegal or excessive.

federal constitutional right to an appeal exists.[3/]

We disagree. As the holding in Abney, quoted above, clearly indicates, the basis for judicial review of a double jeopardy claim is grounded in the double jeopardy clause itself. The procedural problem facing federal courts, as well as state courts, is how that constitutional right can be exercised in view of final judgment statutes. See also United States v. Hollywood Motor Car Co., 458 U.S. 263, 102 S. Ct. 3081, 73 L. Ed. 2d 754 (1982). We turn then to that procedural problem.

C. The Appropriate Vehicle For Appellate Review of a Interlocutory Double Jeopardy Claim: Special Action or Appeal?

[3/]Defendant has not claimed his right to appeal under art. 2 Section 24 of the Arizona Constitution, which provides "[i]n criminal prosecutions, the accused shall have the right . . . to appeal in all cases . . ." Nor has he relied on art. 2 Section 10 of the Arizona Constitution which provides double jeopardy protection to criminal defendants. Because defendant failed to invoke the provisions of the Arizona Constitution, we determine defendant's right to appeal only pursuant to federal constitutional principles.

As Abney indicates, the federal system, because of the lack of any other appellate vehicle, has had to shoe-horn nonfinal orders into a statute that requires finality as a prerequisite to appealability. See 28 U.S.C. Section 1291 ("The courts of appeals shall have jurisdiction from all final decisions . . ."). The tool to effect this result is the "collateral order" exception recognized in Cohen. Arizona need not struggle with this problem because an aggrieved party may seek appellate review of nonappealable interlocutory orders under the special action practice. See Rule 1(a), Arizona Rules of Procedure for Special Actions.

Other jurisdictions have utilized a similar procedure to avoid grappling with a "final judgment rule." The Kansas court, finding Kansas statutes did not provide the right to appeal, dismissed the defendant's appeal with "considerable reluctance." State v. Fisher, 2 Kan. App. 2d 353, 579

P.2d 167 (1978). One year later, the Kansas court revisited the issue and found it unacceptable that a defendant "have no appellate forum available in the Kansas courts to vindicate a valid double jeopardy claim before his is in fact subjected to such jeopardy." In. re Application of Berkowitz, 3 Kan. App. 2d 726, 602 P.2d 99, 103 (1979). The court concluded that habeas corpus, a proceeding that afforded the defendant a "speedy remedy," was the appropriate vehicle for challenging a trial court's pretrial denial of a claim of double jeopardy. See also Ex Parte Robinson, 641 S.W.2d 552 (Tex. Crim. App. 1982) (finding constitutional right to review of double jeopardy claim and affording relief by habeas corpus); State v. Mestas, 93 N.M. 765, 605 P.2d 1164 (App. 1980) (finding no right to appeal as final judgment but finding it unnecessary to reach question whether final judgment should be construed to include an order denying a double

jeopardy claim because pursuant to statutory authority court of appeals permitted to grant interlocutory appeals); State v. Jenich, 292 N.W.2d 348 (Wis. 1980) (upon reconsideration, court modified initial opinion that held a pretrial order denying a motion to dismiss because of double jeopardy claim was a final order appealable under statute, and held such an order did not satisfy statutory test for finality and was not appealable by right under statute, but instead, was a nonfinal order appealable only by permission of court of appeals); People ex re. Mosley v. Carey, 74 Ill. 2d 527, 25 Ill. Dec. 669, 387 N.E.2d 325, cert. denied, Mosley v. Illinois, 444 U.S. 940 (1979) (no right to appeal, but defendant not foreclosed from review because he may file writ of prohibition or mandamus); cf. State v. Forsyth, 587 P.2d 1387 (Utah 1978) (no right to appeal on double jeopardy charge when state refiled charges after

federal court released defendant in habeas proceeding).

The Arizona special action procedure seems particularly suited to the constitutionally mandated right to appellate review of claims of double jeopardy. As stated in Rule 1(a), Arizona Rules of Procedure for Special Actions, the procedure is available "where there is no equally plain, speedy, and adequate remedy by appeal. . . ." We hold that a petition for special action is the appropriate vehicle for a defendant to obtain judicial appellate review of an interlocutory double jeopardy claim.

In reaching this conclusion, we, of necessity, disagree with Division Two's holding in State v. Choate, 151 Ariz. 57, 725 P.2d 764 (App. 1986). In Choate, the court, without analysis, stated "[b]ecause an interlocutory appeal of a double jeopardy claim is constitutionally mandated, Abney . . . we have jurisdiction under A.R.S. 13-

4033(2)." 151 Ariz. at 57-58, 725 P.2d at 764-65. We note, however, that the court also stated in a footnote: "In the more usual case, relief would be by way of special action." Id. at 58 n.1, 725 P.2d at 765 n.1.

Before leaving the subject of interlocutory review, we would be remiss if we did not acknowledge, as the court in Abney acknowledged, that its ruling might encourage some defendants to engage in dilatory appeals. Abney, 431 U.S. at 662 n.8. Sanctions are appropriate when counsel frivolously files a special action, and this court will not hesitate to impose those sanctions if a defendant's right to obtain review of orders implicating double jeopardy is abused. See Rule 7(e), Arizona Rules of Procedure for Special Actions ("The provisions of A.R.S. 12-2106 and of Rule 25, Rules of Civil Appellate Procedure, pertaining to damages for frivolous appeals or appeals for delay, shall apply to special

actions."); Boone v. Superior Court, 145 Ariz. 235, 700 P.2d 1335 (1985).

D. Did the Trial Court Err In Granting A Mistrial?

Although defendant sought special action review only of the court's denial of his stay request, the substance of his double jeopardy claim was raised at this court's request after consolidation of the special action and appeal. We thus turn to the merits of defendant's double jeopardy claim.

Normally, the invocation of a mistrial following the inability of a jury to reach a verdict does not give rise to a claim of double jeopardy. See Rule 22.4, Arizona Rules of Criminal Procedure; McLaughlin v. Fahringer, 150 Ariz. 274, 277, 723 P.2d 92, 95 (1986) ("Jeopardy may be removed for various legal reasons such as: the jury is unable to reach a verdict after lengthy deliberation . . ."). However, defendant points to the note signed by one

juror stating that all the jurors felt the state had not proven its case, but two members had "gut feelings" that they did not want to set defendant free, in contending that a verdict having double jeopardy ramifications was reached.[4/] Relying on Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957), he contends that the juror's note, in effect, acquitted defendant. Green recognized that there may be "acquittal in the constitutional sense

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[4/]Defendant has also raised an issue regarding the state's amendment of his indictment. In Abney, the Court limited its holding and stated that "[i]n determining that the courts of appeals may exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds, we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well." Abney, 431 U.S. at 662, 97 S. Ct. at 2042. The court wished to insure that criminal defendants would not "seek review of, or assert, frivolous double jeopardy claims in order to bring . . . nonappealable questions to the attention of the courts of appeals prior to conviction and sentence." The Court then declined to review the defendant's challenge to the sufficiency of the indictment. We similarly do not reach defendant's challenge to his indictment.

without the return of a formal verdict." In Green, the Court held that the defendant had been acquitted of first degree murder at his first trial when the jury found him guilty of second degree murder. Having found that defendant had once "run the gantlet, [sic]" the Court found it impermissible to retry defendant for first degree murder after he successfully appealed from his second degree conviction. Green is not applicable here, because no final jury verdict, in any issue, was rendered.

In this case, after the jury initially indicated to the court that it could not make a decision with the facts provided, the court allowed continued deliberation because the majority of the jurors felt they might be able to come to a verdict in a reasonable time. Moreover, the note, signed by only one juror, did not purport to be the conclusion of all the jurors. The court, at the final interview, carefully questioned the foreman about

whether additional time would assist the jury in reaching a verdict. The court asked the jurors if anyone disagreed. Only thereafter did the court declare a mistrial. We find no implicit or explicit acquittal under these circumstances.

Defendant, citing no authority, claims the court should have polled the jury regarding the note stating they all felt he had not committed the crime. The state responds that unless the court receives a signed verdict it is under no obligation to poll the jury.

Rule 23.4, Arizona Rules of Criminal Procedure states:

> After the verdict is returned and before the jury is discharged, it shall be polled at the request of any party or upon the court's own initiative . . . .

No verdict had been returned in this case. We find the trial court did not abuse its discretion in disregarding the note signed by one juror and declaring a mistrial.

III. CONCLUSION.

A defendant has the right to seek interlocutory review of a nonfrivolous double jeopardy claim. The proper vehicle to seek such review is special action. Accordingly, we accept special action jurisdiction in this matter and grant the state's motion to dismiss the appeal. On the merits, we find defendant's double jeopardy claim is not well founded. Accordingly, we dissolve the stay previously entered, deny the requested relief, and remand to the trial court for further proceedings.

[signed]
EINO M. JACOBSON
Presiding Judge, Department B

CONCURRING:

[signed]
WILLIAM E. EUBANK, Judge

[signed]
SARAH D. GRANT, Judge